In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 13, ORIGINAL

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF OREGON, DEFENDANT

COMPLAINANT'S EXCEPTION TO THE REPORT OF THE SPECIAL MASTER

The United States of America, complainant herein, presents to the Court its exceptions to the report herein filed by Garret W. McEnerney, Special Master.

I

The complainant excepts to that part of the Special Master's report on page 27 wherein he finds that "the United States challenges the correctness of the Neal line as a whole (81.098 miles)." The Master should have found that the State of Oregon asserted the correctness of such lines, which the United States denied, and took the position that the correctness of the Neal lines was not an issue (Report, p. 26).

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II

The complainant excepts to that part of the Special Master's report on pages 26, 27, 28, and 98 (finding XIII), wherein he finds that, "the meander lines run by Neal were correctly run and properly laid down, made in good faith and without fraud or gross error or mistake, and have ever since their approval remained unimpeached and constitute a correct establishment of the meander lines surveyed by him." As Oregon has no ownership in the Malheur Lake Division, as found by the Master, this finding is not necessary; and it is prejudicial to the United States in its relations and dealings with the owners of patented lots adjacent to the Neal lines. This finding is also not sustained by the evidence.

III

The complainant excepts to that part of the Special Master's report on page 98, (finding XIII), wherein he finds: "In his survey Neal ran a continuous but unclosed meander line at different elevations and without contours (which in no way impairs the correctness of his survey), extending a distance of 81.098 miles on both sides of what are herein called (1) Malheur Lake Division; (2) Narrows Division; (3) Mud Lake Division; (4) substantially the whole of Sand Reef Division and (5) a negligible portion of Harney Lake Division." This finding is irrelevant and immaterial and is not sustained by the evidence. If a finding on the

subject should have been made at all, then the Master should have found: (1) That the Neal lines were correctly run as traverse lines, but did not follow the meanders and shores of Malheur Lake nor the water levels thereof; (2) that in running said lines he attempted to approximate the mean high-water flood lines thereof, leaving unsurveyed large areas of adjacent land, and also islands and promontories of equal elevation belonging to the United States which were then and now are capable of agricultural uses, and were and now are occupied and used as such; (3) that the occasional or annual spring flooding thereof due to melting snow is but temporary, and in every year such waters recede from the lands which they may cover, leaving such areas benefited and irrigated thereby; (4) that with an annual rainfall of only 8.6 inches to 10 inches and an annual evaporation of 40 inches (see Report, p. 113), it is obvious that in a shallow flat lake-bed area such as that of Malheur a normal spring flood water level of 4,093 feet would necessarily recede in every year, leaving valuable land capable of agricultural uses neither applied for nor granted to homestead or other applicants; (5) that with a certain recession of 30 inches (4,093 feet minus 40 inches of evaporation plus 10 inches of rainfall) from the 4,093-foot level, there would be left dry 11,715.8 acres of one foot water covered land, and 10,126.6 acres of one to two foot water covered land, and about half of 6,988.4 acres of two

to three foot water covered land (see Report, p. 119), or a total of more than Twenty-five Thousand acres of agricultural land belonging to the United States within these so-called "meanders", in addition to the 7,991.6 acres of island and promontory land above the 4,093-foot level.

IV

The complainant excepts to that part of the Special Master's report on page 118 (finding XXII) wherein he finds that "all of the lands within the five Divisions below the elevation of 4093, * * * are 'lake bed land' and/or 'the bed of lakes' ", because not sustained by the evidence.

V

The complainant excepts to that part of the Special Master's report on page 118 (finding XXII) wherein he finds that "the line of ordinary or mean high water at the time of the Neal Survey in 1895–1896 and on February 14, 1859 was at a mean elevation of 4093 feet above sea level and was so fixed by Neal", because not sustained by the evidence, and the question is not necessary to be determined in this case.

VI

The complainant excepts to that part of the Special Master's report on page 129 (finding XXX) wherein he finds "* * * but it is true that with waters at the ordinary high-water mark" (4093 feet) "the entire bed within the Meander

Line Boundary would be covered", because not sustained by the evidence.

VII

The complainant excepts to that part of the Special Master's report on page 31 wherein he finds that "The patents to the uplands in this case are substantially, if not identically, in the form of those involved in *Hardin* v. *Jordan*", for the reason that such finding is irrelevant and not necessary to a determination of the issues between the United States and Oregon.

VIII

The complainant excepts to that part of the Special Master's report on page 35 wherein he finds: "I find nothing in the law of Oregon to show that there has been any departure in that State from the common law as announced in *Hardin* v. *Jordan* and *Kean* v. *Calumet Canal Co.* (supra), whereunder a grant of uplands in particular form invests the grantee with title from the water's edge to the center of the lake." Having found that the United States owned 7,991.6 acres of unsurveyed island and promontory land, at or above elevation 4,093 feet within the Neal lines, the Master should not have held that under the cases cited a patentee would go to the center of the lake. As Oregon does not claim under such patents, it is immaterial and irrelevant in this case

whether the adjacent patented lots were in fact water-bound lots with riparian rights or not.

IX

The complainant excepts to that part of the Special Master's report on page 67 wherein he finds: "3. In any event the United States is the owner of 20.20% (or some equitable approach thereto) of the bed of Lake Malheur held in common with owners of upland." Having found that Oregon has no interest in The Malheur Lake Division (Report, p. 67, Section 4) it is not necessary that the Master should have held that the United States owns in common with upland owners 20.20%, or any other percentage of this Division. In computing this 20.20% the Master did not credit the United States with the ownership of the shoreline boundaries of the 7,991.6 acres of island and promontory land above 4,093-foot elevation; nor with the riparian lands belonging to the United States because of its ownership of said island and promontory land.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

JANUARY 1935.

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